Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DOMENIC TRICOME,
Plaintiff-Appellant-Petitioner,

—v.—

EBAY, INC.,
Defendant-Appellee-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 3, 2010 (original)
July 6, 2010 (amended)
September 7, 2010 (amended)

QUESTIONS PRESENTED FOR REVIEW

1. The Appeals Court stated in their en banc decision, "...this Court generally has jurisdiction only over "final decisions" of the district courts, those which "end [ ] the litigation...," "generally" being the key word. The Appeals Court did not examine any documents other than the District Court's Opinion and Decision to change venue. The Appeals Court has judicial discretion available. The intent of TITLE II, Rule 4, (a), (2) Filing Before Entry of Judgment is to allow exceptions. Did the Appeals Court err by not examining the Plaintiff's documents?

2. The Plaintiff communicated to the District Court that the Plaintiff is permanently, extremely disabled, which prevents the Plaintiff from travelling to the Defendant's jurisdiction. The Defendant stated that the Defendant would pay for closed circuit TV, so that the Defendant could be awarded venue. The District Court awarded the Defendant venue. If human beings were not human beings, or, maybe, if human beings advance to the point where touch, mannerisms, eye contact, etc. do not matter, then, maybe, the 14th Amendment should be changed. The Defendant reported profit, not sales, of $2.4 billion, not million, in the 4th quarter of last year[1]. The Defendant has not submitted any evidence that would prevent the Defendant from participating in a trial in the Plaintiff's

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[1] http://investor.ebayinc.com/, Jan 20, 2010, eBay Inc. Reports Fourth Quarter and Full Year 2009 Results

jurisdiction. Given all of the preceding, is the Plaintiff entitled to his literal day in court?

3. During the District Court pretrial, the Plaintiff fired his lawyer. Even though the Plaintiff told the District Court that the Plaintiff was going to hire another lawyer, the District Court ruled before the Plaintiff could hire a lawyer. The District Court's Opinion states that the District Court does not believe the Plaintiff is as sick as the Plaintiff is. The District Court's Opinion incorrectly states the reason why the Plaintiff began his business. Given a good lawyer would have known to submit more evidence, did the District Court err by not waiting to make the District Court's decision on venue until the Plaintiff hired another lawyer? The Plaintiff had no idea there was a need for further evidence. Further, the Plaintiff has no memory of the People of the United States ever mandating Congress to allow the Judiciary to make decisions as the District Court did.

4. In 3 above, the Plaintiff stated that he was going to hire a lawyer. The Plaintiff interviewed a total of two lawyers. They asked who the District Court Judge is. Lawyer Doe 1 is from a suburb in Pittsburg, PA with an office in the Plaintiff's jurisdiction. Lawyer Doe 1 said that the only way to win with this District Court Judge is to have a large, prestigious law firm. Lawyer Doe 2 is from a Philadelphia, PA suburb. Lawyer Doe 2 said that the District Court Judge is not that good.

The Plaintiff is the founder, president and owns part of All the Whey, Inc. All the Whey, Inc. was founded in 2001. Approximately, $2 million has been invested in the company. At the same time as this lawsuit, All the Whey, Inc. was the Plaintiff in another lawsuit[2]. The two lawsuits have the same District Court Judge, Judge Darnell Jones. After Judge Jone's ruling in this lawsuit before the Supreme Court, the Plaintiff asked Judge Jones to recues himself from the All the Whey, Inc. lawsuit. Judge Jones did not.

Judge Jones did not grant the Plaintiffs in the All the Whey, Inc. lawsuit an injunction. Subsequently, the Defendants and their Counsel in the All the Whey, Inc. lawsuit falsified documents. The Defendants and their Counsel stole all the money from All the Whey's bank accounts. All the Whey, Inc. went from sales of over $6 million last year to about $600,000 in debt. All the Whey, Inc. will be closed shortly. Due to the losses the Plaintiffs sustained, the Plaintiffs cannot afford lawyers. The Plaintiffs have lost just about everything.

In the All the Whey, Inc. lawsuit, the Plaintiff in this lawsuit before the Supreme Court faxed and mailed 97 documents to Judge Jones, the Plaintiffs and the Defendants. Judge Jones dismissed the All the Whey, Inc. lawsuit citing a lack of evidence. The 97 documents contained the evidence, which means Judge Jones did not

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[2] U.S. Eastern District Court; Case Number: 2:09-cv-03649-CDJ (FRANKS et al v. FOOD INGREDIENTS INTERNATIONAL, INC. et al).

examine or for an unknown reason did not accept the documents. Again, the Plaintiffs could not afford lawyers. The Plaintiffs did not know that the documents were not examined and/or accepted. Regardless, Judge Jones knew enough of the situation to do something as opposed to nothing.

Given what appears to be mounting evidence of Judge Jones not being able to perform his duties that affected lawsuits including this one before the Supreme Court, should this lawsuit be remanded to the Plaintiff's jurisdiction for trial?

5. Given in 4 above that the Plaintiff cannot afford a lawyer; and given that the District Court's opinion assumes that the Plaintiff can afford a lawyer for the change of venue; and given the District Court's error caused the Plaintiff not to be able to pay for a lawyer, should this lawsuit be remanded to the Plaintiff's jurisdiction for trial?

6. Disregarding the financial catastrophe described above, did the District Court err by ruling that the severely disabled Plaintiff must hire a lawyer[3], eliminating the option of pro se, and the Plaintiff must use a closed circuit TV system with the Plaintiff being in the Plaintiff's jurisdiction with venue in the Defendant's jurisdiction, when

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[3] The District Court's decision assumes that everybody has money for a lawsuit. The decision also assumes that the additional expense, $10,000 to $20,000, to litigate in another jurisdiction is insignificant. This amount is significant for most people.

there is a very obvious, easy and fair alternative, which is not changing venue?

7. A related question due to the preceding is whether the District Court is bias against the disabled and/or the Plaintiff, because the District Court thinks that the disabled, including the Plaintiff, can interact in a court proceeding for eight hours using a closed circuit TV system, as opposed to the disabled person using friends, relatives and/or a lawyer in and out of court in the Plaintiff's jurisdiction to help?

8. Lawyer Doe 1 above stated that the only way to win with the District Court Judge is to have a large, prestigious law firm. The law firm for All the Whey, Inc., mentioned above, has three lawyers. The Plaintiff unintentionally was pro se for the latter part of his lawsuit in the District Court. Is the District Court Judge bias against pro se and/or the Plaintiff due to the preceding, and due to the District Court Judge stating in his decision, "... (unbeknownst to his counsel) sent four rambling, ex parte letters to the Court the last two of which stated that Plaintiff had "fired" his lawyers and accused them of "libel." Plaintiff's counsel moved to withdraw, citing irreconcilable differences. The Court granted the Motion to Withdraw. No other attorney has appeared in this matter on behalf of Plaintiff...?" Given these remarks, the following needs to be stated:
    - By stating, "rambling," has the District Court Judge lost perspective putting writing style above the reason why there is a lawsuit, which establishes bias?

- The lawyer did libel the Plaintiff.
- By not investigating what happened between the Plaintiff and his lawyer, did the District Court Judge wrongly assume that the Plaintiff has little to no character, which establishes bias?
- The Plaintiff faxed and mailed all parties all correspondences at the same time the Plaintiff faxed and mailed the Court.

Further, the District Court's decision states that the Plaintiff is "sophisticated" on the topic of signing the Defendant's "Forum Selection Clause," even though common sense required the Plaintiff to sign, which the Plaintiff explained and documented in detail in the District Court's proceedings. Intent must be examined in such cases. The Plaintiff's intent was and always is honorable. As far as the Plaintiff was concerned, the only way there would be a problem between the parties is if the Defendant annihilated the "User Agreement;" therefore, overriding the Forum Selection Clause. The Defendant did annihilate the contract by the following Defendant's employees telling the Plaintiff to do something in the User Agreement; the Plaintiff did it; and, then, the Defendant terminated the Plaintiff's business account and unrelated personal account for life:

- Vice President of the Legal Department
- Two lawyers of the Legal Department
- Employees from the Office of the President
- Managers
- Managers assigned to the Plaintiff's account

When an agreement's spirit is decimated, the intent and merits of the agreement need to be factored into any and all decisions. Further, when a party in an Agreement commits an egregious act, an almost default decision should be to penalize the offending party:

- The offending party cannot be rewarded venue ad hoc like the Defendant was in this lawsuit. If anything, just the opposite should occur. The offending party should be penalized.
- The victim cannot be refused venue if that prevents them from attending a trial.

The Defendant is registered to do business in all of the states including Pennsylvania, so having the lawsuit in Philadelphia, PA is not an aberration.

9. Whether the District Court erred by awarding venue to the Defendant using the reasoning stated in its decision that local laws, the jury pool, and the judges in the Defendant's jurisdiction may have or have things pertinent to this lawsuit. These are reasons why the case should not be in the Defendant's jurisdiction. Factor in that the Defendant has been consistently, incredibly gung-ho to have jurisdiction, makes one that does not know the Judicial System like the Plaintiff fear there will not be a fair trial. Either the District Court Judge is completely wrong, or there is something wrong. Either way, this lawsuit cannot be in the Defendant's jurisdiction due to fairness.

10. The Defendant is very famous, very rich and the only one of its kind. The Defendant is a partner with their "Sellers." Many disabled people are Sellers. For many of these people, being a Seller is the only possibility of making money. Further, for many disabled, the majority of their social life is through the Defendant's business. Given the Plaintiff is one of these people that used the Defendant's business as his income and social life, did the Courts err in not considering these facts?

    Due to its size and uniqueness, the Defendant has an incredibly heightened responsibility like a utility company, especially given that the Defendant is a publically held company. The Defendant is famous for mistreating everybody including their own employees (ebaysucks.com, etc; Google Search on 5/3/2010: 1,030,000 hits for "ebay sucks"). Around 2007, one of the Defendant's lawyers told the Plaintiff that the Defendant has a building in Utah that deals only with the approximately 20,000 negatives/day the Defendant's members generate. The Plaintiff asked the lower Courts and now this Supreme Court (paraphrase), "If the Defendant is a monopoly with really only their president making the decisions effecting probably a billion people, does a Court need to order the Defendant how to act, given many are harmed and cannot fight the Defendant?" Such a change would benefit the Defendant given the change would be a sign to the many the Defendant has harmed that the Defendant has changed. The Defendant's stock may finally do what many think it should, rival Amazon.com. Instituting an arbitration board at

least partly consisting of people not affiliated with the Defendant for oversight is most certainly appropriate given the unique relationship the Defendant has with the public. Further, is the District Court Judge bias against the disabled, pro se and/or the Plaintiff given the District Judge stated in his decision that the Plaintiff started his business unrelated to the Defendant, because this statement is absolutely false; and has been proved false? The District Court Judge has no proof whatsoever otherwise, because there is no such proof.

11. Whether the District Court erred by stating and rewarding venue based on that all the records are with the Defendant, while in fact the opposite is true. The Defendant does not have the records for everything between their members (Sellers and Buyers). The Sellers (the Plaintiff was a Seller) always have all the records not the Defendant.

12. Whether the District Court erred by stating in its decision that the merits of the case were not decided on, even though the decision on venue included the merits of the case. How can one or some of the merits be factored, and the rest not be factored?

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OPINIONS BELOW

The opinions below are contained in the Appendices ("App.") to this Petition:

- The U.S. District Court for the Eastern District of Pennsylvania October 19, 2009 opinion is reproduced at Appendix A.
- The U.S. Third Circuit Court of Appeals January 7, 2010 opinion and order denying rehearing is reproduced at Appendix B.
- The U.S. District Court for the Eastern District of Pennsylvania October 19, 2009 order is reproduced at Appendix C.
- The U.S. Third Circuit Court of Appeals February 2, 2010 order denying rehearing en banc is reproduced at Appendix D.

JURISDICTION

The U.S. Third Circuit Court of Appeals issued its Order in this case on February 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th Amendment

The Sherman Act

STATEMENT OF THE CASE

The Defendant told the Plaintiff to do something. The Plaintiff did it. The Defendant terminated their contract, because the Plaintiff did what the Defendant said to do.

The Plaintiff is permanently, extremely disabled. The District Court's ruling to change venue prevents the Plaintiff's day in court.

The Plaintiff fired his lawyer in the middle of pretrial in the District Court. Even though the Plaintiff told the Judge that the Plaintiff was interviewing lawyers, the Judge ruled, before the Plaintiff hired a lawyer. Most likely, a lawyer would have prevented the negative outcome.

The District Court Judge had two of the Plaintiff's lawsuits at the same time. The District Court Judge would not recues himself. The District Court Judge's actions allowed basically all of the Plaintiff's money to be stolen. So, the Plaintiff cannot afford a lawyer.

ARGUMENT (in conjunction with Questions)

An unknown disease in the Plaintiff's brain makes him have symptoms of mono and the flu all of the time. For two years, he was in an FDA Phase III Trial for an experimental drug, Ampligen, which was infused twice a week. He cannot travel distances without a lot of difficulty. It would take the Plaintiff about a month to travel to California by car whether

the Plaintiff was driving or somebody else was. A jet's cabin pressure may injure the Plaintiff further or kill the Plaintiff. A change of venue would require the Plaintiff to temporarily move (relocate). There are many added costs for a trial with a change in jurisdiction. The Plaintiff is an individual with limited resources.

The Plaintiff should not have to be a guinea pig. The Plaintiff has never heard of a party being on closed circuit TV for a whole trial and never seeing anybody. Judges and jurists usually visit people that cannot attend the court's proceedings. The Supreme Court has Oral Arguments with the parties in the same room. They do not have a party on closed circuit TV. Most cases don't have video tape of the dispute and/or perfect evidence for everything. Body language, looking into people's eyes, etc. matter.

In general, if severely disabled people had the ability to interact in a court proceeding for eight hours using a closed circuit TV system, they would go to work, and they would not be considered disabled under Social Security and Industry Insurance guidelines. Further, in the District Court's decision, the District Court states that the District Court does not believe that the Plaintiff is as sick as the Plaintiff alleges, yet the District Court ordered that the Plaintiff use a closed circuit TV system due to the Plaintiff's illness. The District Court could have and should have asked for more medical evidence. That would have been a conservative, fair approach. The District Court did not, and the District Court never gave any indication there was a need for more medical evidence. The District Court has no evidence whatsoever to

conclude that the Plaintiff is lying, because there is no such evidence.

The Plaintiff can make it to Court everyday for hours. In conjunction with closed circuit TV, transcripts, family, friends, etc, and if possible a lawyer, the Plaintiff can make a trial be almost normal and more importantly fair. The District Court's solution to not have the Plaintiff be in Court when the Plaintiff could be part of the time, which is significant, goes against the 14th Amendment's due process. The District Court's scenario would make interaction between the Plaintiff and the Plaintiff's lawyer, if the Plaintiff could afford one, difficult, and may preclude the Plaintiff from catching any mistakes the lawyer may make. And, there is the most likely possibility of unnerving the jury by the awkwardness of the situation.

The disabled population is growing, because medical technology is causing people to live longer. The chance that this case can affect others is probably pretty good. And, this case may have possibly created an opening in the Americans with Disabilities act.

The Defendant is one of the richest companies on record earning $2.4 billion in the 4th Quarter of last year. Most would agree that the Defendant should not be negatively affected at all with the jurisdiction in Philadelphia, PA.

Since the Plaintiff was a top Seller, the Plaintiff and Defendant were in constant communication. Given this close relationship, the Defendant knew all the details in this Case well before any dispute, which

includes the Defendant knowing that their actions could, if not would, harm the Plaintiff. The harm is not just financial. The Plaintiff's disease is worst. The Plaintiff was about 10% of normal before the Defendant's negligence. Now, the Plaintiff is about 5%. Sick people usually cannot take things like what the Defendant did, a constant barrage of ridiculousness ending in termination of the Plaintiff's accounts. The Defendant's actions caused the Plaintiff to sell his business with the amount being far less than it should have been. About 100 employees were affected. The Defendant has affected the Plaintiff so much that the writing of this document is even affected. The Plaintiff may lose this lawsuit, because he has less health and money due to the Defendant.

After the Defendant terminated the Plaintiff, the Defendant started its defense by defaming the Plaintiff, since the Defendant has no other defense.

User Agreements are written to be unfair. The Plaintiff believes the Supreme Court understands them well, so there is no need for further discussion.

Venue is unconstitutional. It has a built-in flaw, because it can reward the guilty party. Venue is used a lot to prevent justice. Venue is always argued, so there is no reason for it.

The Defendant's counsel is smart. They read into the District Court Judge's reaction to the Plaintiff firing his lawyer. Before the firing, the District Court Judge seemed ready to award the Plaintiff venue. So, when the local Defendant's lawyer switched firms,

the Defendant kept the lawyer not the firm to not unnerve the District Court Judge. The lawyer is just an associate, and does not have the experience with these cases.

The Plaintiff fired the lawyer, because the Plaintiff received a bill from the lawyer that was about twice as high as it should have been. The Plaintiff asked the lawyer for an explanation. The lawyer answered by sending the Plaintiff another bill for $1,500 for four lawyers analyzing the Plaintiff's bill.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Dated: 9/7/2010

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

DOMENIC TRICOME,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 09-2492
	:	
v.	:	
	:	
EBAY, INC., et al.	:	
	:	
Defendants.	:	

Jones II, J. **October 19, 2009**

MEMORANDUM

Presently before the Court is Defendant eBay, Inc.'s Motion to Dismiss or Transfer Plaintiff's Amended Complaint (Docket No. 16), Plaintiff's Response thereto, and Defendant's Reply[1]. The Motion will be granted in part.

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[1] Plaintiff (unbeknownst to his counsel) sent four rambling, ex parte letters to the Court, the last two of which stated that Plaintiff had "fired" his lawyers and accused them of "libel." Plaintiff's counsel moved to withdraw, citing irreconcilable differences. The Court granted the Motion to Withdraw. No

I. Background and Facts

EBay, Inc. ("Defendant") operates an online marketplace on which "users" – *i.e.*, individuals who register to use eBay's services – may list items they wish to sell and through which buyers may purchase items from third-party sellers. In order to buy or sell on eBay, individuals must first register. As part of the registration process, a potential user must complete a registration form and electronically submit the form to eBay. In order to activate the registration process, the potential user must read and agree to eBay's User Agreement, which contains the terms and conditions pertaining to the relationship between the user and eBay. The potential user must accept the User Agreement by affirmatively checking a box that states "I accept the

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other attorney has appeared in this matter on behalf of Plaintiff.

User Agreement and Privacy Policy," and then clicking on a button to continue with the registration process. Users who do not check the box stating "I accept the User Agreement and Privacy Policy" are not permitted to complete the registration process. The eBay User Agreement contains a provision (the "Forum Selection Clause") that specifically requires that disputes between eBay and its users be resolved through a court action filed in Santa Clara County, California. See User Agr., Resolution of Disputes.

In 2006, Domenic Tricome ("Plaintiff") was the owner/operator of www.supplementmarket.com, an online store which allowed customers to purchase various types of vitamins and supplements. Am. Compl. at 2. In conjunction with Plaintiff's own website, Plaintiff also listed items from his store for auction on eBay's website, www.ebay.com. Id.

When Plaintiff registered with eBay, he explicitly followed the registration procedures by clicking the box stating "I accept the User Agreement and Privacy Policy." Had Plaintiff not clicked that box, he would not have been allowed to register.

Plaintiff was ranked as an "expert seller" by eBay's electronic ranking system. Id. In 2006, Plaintiff informed eBay that he had wrongfully received "negative feedback" from one of eBay's customers "in an attempt to extort the Plaintiff." Id. In response, eBay informed Plaintiff that it could take no action on Plaintiff's behalf and that Plaintiff's only recourse would be to file a civil action against the customer at issue. Id. at 3. Plaintiff thereafter filed such a civil action. Id. Upon learning of that civil action, eBay terminated Plaintiff's eBay account. Id. Plaintiff alleges that the termination

forced him to sell his business at a fraction of what it was worth. Id.

Plaintiff filed an Amended Complaint on July 16, 2009, against eBay and its directors[2]. In his brief Complaint, Plaintiff "seeks recovery in fraud, negligence, gross negligence, breach of contract and negligent infliction of emotional distress," and "seeks to recover losses, costs, and attorneys' fees" pursuant to "the Sherman Antitrust Act." Id. at 1. Plaintiff is a Pennsylvania resident. Ebay is a California corporation with its principal place of business in California.

II. Discussion

A. Forum Selection Clause

A forum selection clause is *prima facie* valid "and should be enforced unless enforcement

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[2] There is no evidence that any party other than eBay has ever been served. Plaintiff appears to have abandoned the claims against the individual defendants.

is shown by the resisting party to be unreasonable under the circumstances." Applied Card Systems, Inc. v. Winthrop Resources Corp., No. Civ. A. 03-4104, 2003 WL 22351950, *2 (E.D. Pa. Sept. 23, 2003) (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972)). See also Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (holding that, although not fully dispositive, a forum selection clause is to be given "substantial consideration" and overcomes a court's usual deference to the plaintiff's choice of forum); Jumara v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995) ("[A] forum selection clause is...a manifestation of the parties' preferences as to a convenient forum."). Where the forum selection clause is valid, the plaintiff "bear[s] the burden of demonstrating why [he] should not be bound by the[ ] [parties] contractual choice of forum." Id.

Plaintiff argues that the Forum Selection Clause contained in the User Agreement should not be enforced because the User Agreement is a standard form contract which is procedurally and/or substantively unconscionable.

Procedural unconscionability is generally found where the agreement is a contract of adhesion. Alexander v. Anthony Int'l., L.P., 341 F.3d 256, 265 (3d Cir. 2003). Plaintiff contends that this Court should find the User Agreement to be a contract of adhesion because "[p]laintiff never had the opportunity to discuss, much less negotiate the [Forum Selection Clause]." See Pl's Resp. at 9. A contract is not necessarily one of adhesion simply because it is a form contract, Feldman v. Google, 513 F. Supp. 2d 229, 241 (E.D. Pa. 2007), and failure to read the terms of an agreement is not a defense, Wilson of Wallingford v. Reliable Date Sys., Inc.,

1995 WL 734232, at *2 (E.D. Pa. Dec. 5, 1995). Furthermore, failure to negotiate does not render an otherwise valid forum selection clause invalid. See Great W. Mortgage Corp. v. Peacock, 110 F3d 222, 229 (3d Cir. 1997) (illustrating that more than a disparity in bargaining power is needed in order to show that an agreement was not entered into willingly); Pritzker v. Merril Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1118 (3d Cir. 1993) (same); Wilson of Wallingford, 1995 WL 734232, at *2 (indicating that a party is presumed to have received appropriate consideration for a forum selection clause).[3] The United States Supreme Court has explicitly held that a forum selection clause in a standardized, non-negotiable contract may be quite

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[3] Indeed, even an admittedly adhesionary contract term is enforceable unless it is "so one sided as to be oppressive." Grant v. Philadelphia Eagles LLC, Civ. A. No. 09-1222, 2009 WL 1845231, *7 (E.D.Pa., June 24, 2009) (citing Seus v. Nuveen & Co., 146 F.3d 175, 184 (3d Cir. 1998)).

permissible. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991) (finding the non-negotiable forum selection clause to be acceptable because the cruise line had a special interest in limiting fora as it could be subject to suit in many locales). Instead, the touchstone for unacceptability is whether the party challenging the agreement had any meaningful choice regarding acceptance of its provisions. Grant, 2009 WL 1845231 at *6.

The Court concludes that the User Agreement is not a contract of adhesion because of its Forum Selection Clause. Agreeing to the User Agreement, and thus all of its terms, was not necessary for Plaintiff; instead, Plaintiff did so merely to increase his business opportunities (and thus, his profits). Plaintiff had the opportunity to carefully read the User Agreement and reject the terms contained therein. However, he accepted the User Agreement.

Moreover, eBay did not engage in high pressure tactics or put external pressure on Plaintiff to accept the User Agreement – it simply made the opportunity available to the general public. Here, Plaintiff – an experienced businessman – sought out eBay's services, chose to become a registered user of eBay, and by doing so acknowledged that he had read and agreed to the terms of the User Agreement, including the Forum Selection Clause. Moreover, the same rationale applies here as in Carnival Cruise Lines – eBay has similar concerns as Carnival because its users are located across the U.S. and the world – so the Forum Selection Clause has a legitimate basis.

Plaintiff also maintains that the Forum Selection Clause is substantively unconscionable because it was "one-sided and non-negotiable" and that Plaintiff had "no meaningful choice but to

accept." For substantive unconscionability, courts look for overly harsh or one-sided results that are so "unreasonably favorable to the drafter," Grant, 2009 WL 1845231, at *7, that they "shock the conscience," Feldman, 513 F. Supp. 2d at 242. See also Pentecostal Temple Church v. Streaming Faith, LLC, 2008 WL 4279842, at *5 (W.D. Pa. Sept. 16, 2008) (same).

The Court concludes that the Forum Selection Clause is not substantively unconscionable because it is not so unduly one-sided so as to shock the conscience. EBay operates around the world and it not shocking for it to want to focus its legal defense in a particular forum rather than have to litigate in potentially hundreds or thousands of other jurisdictions. The Court agrees with eBay that the Forum Selection Clause also conserves litigant and judicial resources by dispelling confusion over where

suits are to be brought; this is not a "shocking" motive or result. Moreover, once again, it is clear that Plaintiff certainly had a meaningful choice not to accept – he sought to use eBay merely to augment an existing business. There is simply nothing unique about the Forum Selection Clause that shocks the conscience.

B. Transfer of Venue

Third Circuit precedent leaves no doubt that "dismissal is a permissible means of enforcing a forum selection clause that allows suit to be filed in another federal forum." Applied Card Systems, Inc., 2003 WL 22351950, at *1 (citing Salovaara v. Jackson Nat'l Life Ins. Co., 55 F.3d 289 (3d Cir. 2001)). The Third Circuit has noted, however, that, as a general matter, it makes better sense when the parties have agreed upon a not-unreasonable forum selection clause that points to another federal venue,

to transfer rather than dismiss. Salovaara, 246 F.3d at 299.

28 U.S.C. § 1404(a) is the appropriate statutory provision for transfer of an action when jurisdiction is proper in both the original and the requested forum. Jumara, 55 F.3d at 878. Section 1404(a) provides "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Beyond sole reliance on this statutory authority, the Third Circuit has enumerated additional private and public interests that the court may consider in deciding whether to grant a motion to transfer. The private interests include: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as

indicated by their relative physical and financial condition; the convenience of the witnesses – but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of the books and records. Applied Card Systems, Inc., 2003 WL 22351950, at *2 (citing Jumara, 55 F.3d at 879-80). The public interests include: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; and the familiarity of the trial judge with the applicable state law in diversity cases. Id. Importantly, however, while the court must balance these factors, the "presence of a forum selection clause...will be a significant factor that figures centrally in the district court's calculus," id.

(citing Stewart Org., Inc., 487 U.S. at 30), and should be given "substantial consideration," Jumara, 55 F.3d at 880. Accordingly, the Court begins its balancing with the fact that the valid Forum Selection Clause is a central and significant factor that weighs in favor of transfer.

Weighing the 1404(a) factors in light of the Forum Selection Clause, the Court finds that transfer to the U.S. District Court for the Northern District of California, San Jose Division,[4] is appropriate in this case. The plain language of the Forum Selection Clause encompasses this action within its scope and suggests that venue in California is mandatory. As discussed, supra, Plaintiff does not contend that the Forum Selection Clause was procured through fraud or overreaching.

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[4] Plaintiff's Amended Complaint contains a federal antitrust claim, and this district encompasses Santa Clara County.

In fact, the User Agreement was a freely negotiated contracted entered into by a sophisticated business and a sophisticated businessman and thus expresses a mutual preference for California venue.

Although it may be challenging, the Court is not convinced that litigating this dispute in California would be prohibitively difficult for Plaintiff. Inconvenience or additional expense is not the test of unreasonableness "since it may be assumed that the plaintiff received under the contract consideration for these things..." Cent. Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344 (3d Cir. 1966) (citation omitted). The Court finds that Plaintiff's limitations are not so gravely difficult as to preclude him from participating in the litigation of the instant dispute. Plaintiff's local attorney may represent him *pro hac vice* in California at the same rates, thus relieving Plaintiff

from the requirement of hiring a California lawyer.[5] Moreover, eBay has represented on the record that it will make physical accommodations for Plaintiff, such as telephonic or video appearances and the scheduling of depositions near Plaintiff's home in Pennsylvania. Additionally, Plaintiff's presence is not even required (electronically or otherwise) at every court conference and/or argument (or even the majority thereof).[6]

Furthermore, the Court finds that the Northern District of California would provide a more convenient forum for this action. Most of the eBay's employees and records are located in California. Moreover, the local courts have a strong

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[5] Even if this were not true, hiring counsel in other jurisdictions is a common and often necessary practice in federal litigation, and is a part of the unavoidable costs that must be borne by litigating parties.

[6] Accordingly, the Court cannot agree with Plaintiff that he would have to permanently "relocate to California" or "move cross-country" to pursue this matter. See Pl's Resp. Br. at 13-15.

interest in resolving this matter, given that eBay, a California corporation with its principal place of business in California, utilizes the same User Agreement in its business dealing with every individual who is registered (*i.e.*, permitted) to use eBay's services. Finally, a California district judge would be more familiar with the law governing plaintiff's supplemental state law claims.

III. Conclusion

The Court finds that the User Agreement, including the Forum Selection Clause, is valid, because it is not procedurally or substantively unconscionable. The Court concludes that transfer of venue is more desirable than dismissal. The Court concludes that transfer to California would not be so gravely difficult or inconvenient as to deny Plaintiff his day in court. Weighing the appropriate factors

and the parties' Forum Selection Clause, the Court finds that this action should be transferred to the Northern District of California, San Jose Division. Accordingly, Defendant's Motion will be denied as to dismissal and granted as to transfer of venue. An appropriate Order follows.

APPENDIX B

***Amended ALD-085** **January 5, 2010**
December 31, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **09-4424**

DOMENIC TRICOME, Appellant

VS.

EBAY, INC.

(E.D. Pa. Civ. No. 2:09-cv-02492)

Present: SLOVITER, AMBRO, and SMITH, Circuit Judges

Submitted are:
(1) By the Clerk for possible dismissal due to a jurisdictional defect;
(2) Appellant's response on the issue of appellate jurisdiction; and
***(3) Appellant's addendum to argument on the issue of appellate jurisdiction, dated January 5, 2010**

in the above-captioned case.

Respectfully,

Clerk

MMW/AR/cjg

ORDER

The foregoing appeal is dismissed for lack of appellate jurisdiction. Under 28 U.S.C. § 1291, this Court generally has jurisdiction only over "final decisions" of the district courts, those which "end [ ] the litigation on its merits and leave [ ] nothing for the court to do but execute the judgment." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987) (citation omitted). The District Court's October 20, 2009 order had no final effect, as it did not rule on the merits of appellant's claim and did not end the litigation. The order transferred the matter to another venue, expressly contemplating further proceedings in a District Court. See Nascone v. Spudnuts, Inc., 735 F.2d 763, 764 (3d Cir. 1984). Accordingly, the foregoing appeal is hereby dismissed. In accordance with the District Court's October 20, 2009 order, it appears that the Clerk of the District Court should effectuate the transfer.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: January 7, 2010

CJG/cc: Mr. Domenic Tricome
Meghan K. Finnerty, Esq.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

DOMENIC TRICOME,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 09-2492
	:	
v.	:	
	:	
EBAY, INC., et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 19th day of October, 2009, it is hereby ORDERED that:

1. All Defendants other than eBay, Inc., are DISMISSED WITHOUT PREJUDICE;

2. Defendant eBAY, Inc.'s Motion to Dismiss or Transfer (Docket No. 16) is DENIED IN PART AND GRANTED IN PART. It is denied as to dismissal and granted as to transfer

of venue;

3. The matter is TRANSFERRED to the U.S. District Court for the Northern District of California, San Jose Division;

4. The Clerk shall close this case for statistical purposes in the Eastern District of Pennsylvania.

BY THE COURT:

/s/ C. Darnell Jones II
C. DARNELL JONES II, J.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-4424

DOMENIC TRICOME,
Appellant

v.

EBAY, INC.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, Circuit Judges

The petition for rehearing filed by Appellant, Domenic Tricome, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: February 2, 2010
CJG/cc: Mr. Domenic Tricome
Meghan K. Finnerty, Esq.